NO. 78-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

RANDALL O. WALKER,
Petitioner

v.

DALE S. NEWGENT AND GENERAL MOTORS CORPORATION AND ITS OPEL DIVISION, ITS SUBSIDIARY, ADAM OPEL AG,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Randall O. Walker, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on November 2, 1978.

I.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals is reported in 583 F.2d 163 and is hereto appended in Appendix A. The district court's opinion in this same case is reported at 442 F.Supp. 38 (S.D. Tex. 1977); *see* Appendix B.

II.

STATEMENT OF JURISDICTION

The judgment of the court below was entered on November 2, 1978 (Appendix A).

This Court has jurisdiction of this application for the writ of certiorari pursuant to 28 U.S.C. § 1254(1).

III.

QUESTION PRESENTED FOR REVIEW

Is Adam Opel AG ("Opel") amenable to suit in the State of Texas under TEX. REV. CIV. STAT. ANN. art. 2031(b) and the U. S. Constitution.

IV.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

TEX. REV. CIV. STAT. ANN. art. 2031(b) provides in pertinent part as follows:

> Article 2031(b). Service of process upon foreign corporations and nonresidents.

> Failure to appoint agent; designation of Secretary of State as lawful attorney.
>
> Sec. 1. When any foreign corporation . . . subject to Section 3 of this Act, has not appointed or maintained a designated agent, upon whom service of process can be made . . . such corporation . . . shall be conclusively presumed to have designated the Secretary of State of Texas as their true and lawful attorney upon whom service of process or complaint may be made.
>
> * * *
>
> Act of engaging in business in state as equivalent to appointment of Secretary of State as agent.
>
> Sec. 3 Any foreign corporation . . . that engages in business in this State . . . and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation . . . of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit, or proceeding arising out of such business done in this State, wherein such corporation . . . is a party or is to be made a party.
>
> Doing Business in state; definition.
>
> Sec. 4. For the purpose of this Act, and without including other acts that may constitute business, any foreign corporation . . . shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

V.

STATEMENT OF CASE

The basis for federal jurisdiction in the court of first instance is diversity of citizenship pursuant to 28 U.S.C. § 1332. Service is sought under the Texas long-arm statute, TEX. REV. CIV. STAT. ANN. art. 2031(b).

While riding as a passenger in a 1963 Opel Rekord which was involved in an automobile collision in Germany, Petitioner Walker, who was in Germany serving as a member of the United States Armed Forces, was totally disabled and blinded. He sued Newgent, the driver of the car, for negligence and subsequently settled with him. He also sued General Motors and Adam Opel AG ("Opel") on the basis of negligence, strict liability in tort for the defective design and manufacture of the windshield glass in the 1963 Opel Rekord, and breach of express and implied warranties. The automobile in question was designed, manufactured, and marketed by the defendants, General Motors Corporation and Adam Opel AG. Adam Opel AG is a German corporation constituting a wholly-owned subsidiary of General Motors Corporation, a United States corporation doing business throughout the United States, including Houston, Harris County, Texas.

This action was filed on April 12, 1973. Process was served through a single citation in April, 1973, on General Motors corporation and its subsidiary, Adam Opel AG, through General Motor's agent for service of process, C. T. Corporation Systems in Dallas, Texas. Attorneys for General Motors filed an answer purportedly on behalf of General Motors and Adam Opel AG. Following

discovery, these same attorneys filed a motion to withdraw the answer filed for Opel on the basis that Opel was a separate corporate entity organized under German law having no agent for service in Texas and that the answer filed on its behalf was without its authorization or knowledge. On August 12, 1974, the district court ordered that separate citations be issued and served on Opel. In response to that order, plaintiff served (1) C. T. Corporation, (2) Mr. T. M. Wetzel, Secretary-Treasurer of Al Parker Buick Company, a local automobile dealer, (3) Mrs. A. R. Varela, Secretary to the zone service manager of the Buick Motor Division of G.M., and (4) the Secretary to State of Texas, pursuant to TEX. REV. CIV. STAT. ANN. art. 2031(b). Opel moved the court to vacate and set aside service of process and to dismiss for lack of personal jurisdiction, submitting affidavits from the first three persons listed above reflecting that they were not authorized to receive service for Opel. The district court granted Opel's motion. *See Walker v. Newgent,* 442 F.Supp. 38 (S.D. Tex. 1977).

Subsequently, General Motors moved for summary judgment on the grounds that (1) it did not design, manufacture, or sell the automobile in question and (2) there was no ground for disregarding the separate corporate existence of Opel, as the trial court had already held when it granted Opel's motion to dismiss. The district court granted G.M.'s motion on February 6, 1978.

VI.

REASONS FOR GRANTING THE WRIT

A. This case merits review by this Court on certiorari because the Court of Appeals has misinterpreted the de-

gree of control required by one corporation over another so as to permit imputing to the controlling corporation the business done within the forum state by the other corporation.

B. This case merits review by this Court on certiorari to reconsider the applicability of *Cannon Mfg. Co. v. Cudahy Co.*, 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 635 (1925) in light of the decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) to a situation where "doing business" is complicated by the presence of a parent-subsidiary relationship between corporations.

C. This case merits review by this Court on certiorari to clarify the fact that corporate law liability principles and constitutional due process provisions for jurisdiction are not coextensive.

D. This case merits review by this Court on certiorari to settle the issue that foreseeable effects within the forum of a defendant's activities outside the forum can be sufficient to maintain in personam jurisdiction when purposeful and substantial advantage, though indirect, has been taken of the forum market.

VII.

ARGUMENT

THE DEGREE OF CONTROL BY GM OVER OPEL IS SUFFICIENT TO ESTABLISH JURISDICTION OVER OPEL

The power of a federal court to acquire in personam jurisdiction over a nonresident defendant in a diversity of citizenship case turns on two independent considerations.

First, the law of the state in which the federal court sits must confer jurisdiction over the person of the defendant; and secondly, if it does, the exercise of jurisdiction under state law must comport with basic due process requirements of the United States Constitution.[1] The burden is on the plaintiff to make a prima facie showing of the facts on which jurisdiction is predicated.[2]

In Texas, the applicable statutory authority concerning service of process and personal jurisdiction is Article 2031(b) of Vernon's Texas Revised Civil Statutes Annotated. The Fifth Circuit has recognized that Article 2031(b) represents an effort by Texas to reach as far as federal constitutional requirements of due process will permit in exercising in personam jurisdiction over non-resident defendants.[3] In view of this approach by the Fifth Circuit, most challenges to personal jurisdiction of non-resident defendants arising under the Texas Long-Arm Statute, whether in federal or state court, should be and have been determined in accordance with constitutional considerations.[4]

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1. Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 489 (5th Cir. 1974); Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973); Atwood Hatcheries v. Heisdorf and Nelson Farms, 357 F.2d 847, 852 (5th Cir. 1966).

2. Product Promotions, Inc. v. Cousteau, 495 F.2d at 491.

3. Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *citing* Product Promotions, Inc. v. Cousteau, 495 F.2d 483; Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228; and U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977); Gurley v. Lindsley, 459 F.2d 268 (5th Cir. 1972), *mandate amended* 466 F.2d 498.

4. *See* Atwood Hatcheries v. Heisdorf and Nelson Farms, 357 F.2d 847; Lone Star Motor Import, Inc. v. Citroen Cars Corp. 185 F.Supp. 48 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961); Hoppenfeld v. Crook, 498 S.W.2d 52, 56 (Tex. Civ. App.—Austin 1973, writ ref'd. n.r.e.).

One way to establish a prima facie case under Article 2031(b) is to have the plaintiff show that the defendant was doing business in the state and that the present action arises out of such business.[5]

Both the Texas courts and the Fifth Circuit have employed alter-ego and agency theories to justify a finding that the parent is doing business in Texas through its subsidiary.[6] The appellate panel in the instant case has stated that these theories are equally applicable to the present situation where jurisdiction is sought over the subsidiary through its parent's local activities.[7]

The Court of Appeals has ruled that petitioner has not presented evidence establishing such a degree of control by General Motors over Opel as to permit imputing the business done in Texas by GM to its subsidiary Opel. Petitioner submits that the record reflects otherwise as is shown in the following:

1) Adam Opel AG was a wholly owned subsidiary of General Motors Corporation.

2) GM is presently doing business in Texas and was doing business in the 1960's and the 1970's in the State of Texas.

3) Adam Opel AG was designing, manufacturing, and marketing Opels, including the Opel Rekord in 1963 both for export to the United States and for sale in the United States as well as for sale abroad.

5. Product Promotions, Inc. v. Cousteau, 495 F.2d at 491.

6. Reul v. Sahara Hotel, 372 F.Supp. 995, 997 (S.D. Tex. 1974) Product Promotions, Inc. v. Cousteau, 495 F.2d at 492-93; Hitt v. Nissan Motor Co., 399 F.Supp. 838 (S.D. Fla. 1975).

7. Walker v. Newgent, 583 F.2d 619.

4) Mr. Bill Morey, the zone manager of the Buick Division of General Motors, testifed by deposition that it was his function to act as liaison in the sale and service of the Buick products to the 109 dealers in the Houston zone, and that the sale and service of the Buick parts included the sale and service of the Opel.

5) Mr. Morey testified that his chief function with respect to Opels was to see that they were properly distributed to the dealers, and he confirmed that the Opel automobiles were being shipped from Germany to the Port of Houston during the time in question in the 1960's and the 1970's. There were at least four or five dealers in Houston during the time in question who were selling, servicing, and advertising Opel automobiles.

6) It was clearly the intention of Adam Opel AG during the time in question that Opel automobiles be exported to this country, including Texas, on the orders of the parent, General Motors Corporation.

7) Mr. Shea testified that in his position as Director of Marketing Staff Operations of the Overseas Division of General Motors he was the liaison man for importing the Opel from Germany to the United States from 1963 until 1975.

8) Several hundred persons in the Overseas Division of General Motors worked abroad in Germany and several thousand worked here in the United States.

9) Mr. Shea testified that he discussed with Adam Opel, at least several times a week during the period in question, the home delivery program which was concerned with the placing of individual orders from United States customers.

10) Mr. Scheskat, manager of the export division of Adam Opel during the period in question, visited this country on at least one or two occasions to discuss business matters with GM.

CANNON IS INAPPLICABLE IN A PARENT-SUBSIDIARY SETTING AFTER *INTERNATIONAL SHOE*

As a general test, Texas has adopted the rationale of *Cannon Mfg. Co. v. Cudahy Co.*[8] to determine whether the parent and subsidiary are one and the same corporate entity for purposes of jurisdiction.[9] *Cannon* was decided under the older "doing business" standard rather than the more liberal "minimum contacts" test of *International Shoe;*[10] therefore, petitioner asserts that the *Cannon* test is not mandated by the due process clause. Moreover, Mr. Justice Brandeis stated expressly that *Cannon* does not raise directly any "question of the constitutional powers of the State, or of the federal government."[11] In *Hitt v. Nissan Motor Co.*,[12] the court distinguished *Cannon*, in part on the ground that; " . . . *Cannon* involved no question of the constitutional powers of the state or of the federal government but it was merely the Supreme Court's interpretation of what activities constituted "doing business" within a forum and thus involved the concept of "presence" and not the less rigid

8. 276 U.S. 333 (1925).

9. *E.g. Murdock v. Volvo of America Corp.*, 403 F.Supp. 55 (N.D. Tex. 1975).

10. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

11. 267 U.S. at 336.

12. 399 F.Supp. at 849.

"minimum contacts" test of *International Shoe.*"[13] Thus rejecting the *Cannon* standard and notions of "piercing the corporate veil," the court decided the jurisdiction question on the basis of minimum contacts and the state long-arm statute.[14] The thrust of petitioner's application is to shut the door the Fifth Circuit panel has left open with its holding in the present case. There is potential for unfairness under *Cannon*, and this has become a reality through Opel's taking advantage of doing business within Texas through GM while remaining immune from suit.[15]

Cannon should not apply to cases such as the present one where the nonresident corporation is a foreign national since in such a case a finding that the foreign corporation is not amenable to service of process effectively precludes the claimant any remedy or relief in courts of this country. The court in *Frito-Lay, Inc. v.*

13. *Id.* at 849.

14. A number of commentators argue that Cannon should be discarded as the jurisdictional test. *See* Note, N.C.L. REV. 181 (1958) (argues Cannon's application inappropriate since Erie-Tompkins); Wellborn, *Subsidiary Corporations in New York. When is Mere Ownership Enough to Establish Jurisdiction Over the Parent,* 22 BUFF. L. REV. 681 (1973) (Cannon rationale should be abolished and replaced with "single economic entity" test); Comment, *Jurisdiction Over Parent Corporations,* 51 CALIF. L. REV. 574 (1963) (Identifies the exceptions to the Cannon rule). *See also* O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir. 1974) noted 8 VAND. J. TRANS. L. 249 (1974).

15. *See* Crucible, Inc. v. Stora Kopparbergs Bergslags AB, 403 F.Supp. 9, 13 (W.D. Pa. 1975). *Cf* Harris v. Deere & Co., 223 F.2d 161, 162 (4th Cir. 1955) (following majority rule although "[m]uch can be said in support of the view that a manufacturer which distributes its product by selling it to a wholly owned and completely controlled subsidiary, should, for purposes of jurisdiction in the courts, be held to be doing business where the subsidiary sells the product").

Proctor & Gamble Co.[16] suggests that *Cannon* should be less strictly applied in the case of a foreign national.

CORPORATE LIABILITY AND JURISDICTIONAL TESTS ARE NOT IDENTICAL

It is petitioner's position that the Texas long-arm statute authorizes jurisdiction over a foreign based corporation solely because of the sufficiently appropriate activities of its parent within the forum.[17] Such authorization is well within the minimum contacts required by due process. Where courts have held that a parent-subsidiary relationship is insufficient to support jurisdiction over the parent when the subsidiary maintains clearly established minimum contacts with the forum, the lack of jurisdiction has been adjudicated by applying principles of corporate law historically used to establish ultimate *liability*. However, the petitioner urges that these principles are not required, nor even warranted, to establish jurisdiction under minimum contacts requirements. Thus, there is no constitutional impediment to a long-arm statute authorizing jurisdiction over a corporation on the

16. 364 F.Supp. 243, 250 (N.D. Tex. 1973) *citing* Boryk v. de-Havilland Aircraft Co., 341 F.2d 666 (2d Cir. 1965); Tokyo Boeki (U.S.A.), Inc. v. S. S. Navarino, 324 F.Supp. (S.D. N.Y. 1971). *Compare* United States v. Scophony Corp. of America, 333 U.S. 795 (1948). There is a split of opinion as to whether Scophony overruled Cannon by implication in the context of antitrust litigation. *See* Frito-Lay, Inc. v. Proctor & Gamble Co. 364 F.Supp. 243 (Cannon still good law); Call Carl, Inc. v. B. P. Oil Co., 391 F.Supp. 367 (D.C. Md. 1975) (Cannon no longer applicable to antitrust cases). *See also* Zenith Radio Corp. v. Matsushita Electronics, 402 F.Supp. 262 (E.D. Pa. 1975); Flack Oil Co. v. Continental Oil Co., 277 F.Supp. 357 (D.C. Colo. 1967).

17. *See* Hitt v. Nissan Motor Co., 399 F.Supp. 838.

basis of its subsidiaries' or parent's activities in the state.[18]

IN CERTAIN SITUATIONS, FORESEEABLE EFFECTS OF DEFENDANT'S ACTIVITIES ARE SUFFICIENT TO MAINTAIN JURISDICTION

The appellate panel erred in holding that plaintiff did not meet the "minimum contacts" requirements set out most recently by the Fifth Circuit in *Great Western United Corp. v. Kidwell.*[19] Reading the "minimum contacts" requirement as broadly as due process permits, the *Kidwell* court declared that these contacts "need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects in the forum state will suffice."[20] Petitioner maintains that Opel's activities in Germany, especially considering its substantial dealings with GM, have such foreseeable effects in Texas. Opel was well aware that its cars would reach the United States and Texas and that the end disposition would be American consumers. A paper transaction in Germany should not be allowed to be raised as an "immunity from suit" shield while Opel was taking purposeful, though indirect, advantage of Texas markets.

For the foregoing reasons it is submitted that the Petition for Certiorari should be granted to review the

18. *Id.;* Crucible, Inc. v. Stora Kopparbergs AB, 403 F.Supp. 9.

19. 577 F.2d 1256.

20. *Id.* at 1266-67.

judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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By: _____
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_____
LIZ NEUMANN, *Of Counsel*

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument were forwarded to John T. Golden and John E. Kennedy, VINSON & ELKINS, 2100 First City National Bank Building, Houston, Texas 77002 on this ____ day of January, 1979, by certified mail, return receipt requested.

_____

APPENDIX A

RANDALL O. WALKER, Plaintiff-Appellant,

v.

GALE S. NEWGENT and General Motors Corporation and its Opel Division, it subsidiary, Adam Opel, AG, Defendants-Appellees.

No. 78-1371

Summary Calendar.*

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Nov. 2, 1978.

A passenger injured in an automobile collision in Germany brought an action, inter alia, against manufacturer of automobile, alleging that vehicle was defectively manufactured and unsafe and that such defects were proximate cause of the injuries. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., 442 F.Supp. 38, dismissed case and passenger appealed. The Court of Appeals, Gee, Circuit Judge, held that the manufacturer, which was a wholly owned German subsidiary of an American automobile manufacturer doing business in the district, was not amenable to service of process under the Texas long-arm statute.

Affirmed.

* Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Cas. Co. of New York et al.*, 5th Cir., 1970, 431 F.2d 409, Part I.

Richard W. Mithoff, Houston, Tex., for plaintiff-appellant.

John T. Golden, John E. Kennedy, Houston, Tex., for General Motors Corp. and Adam Opel AG, Vinson & Elkins.

Appeal from the United States District Court for the Southern District of Texas.

Before RONEY, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

Plaintiff-appellant, Randall Walker, while a member of the United States Armed Forces in Germany, was a passenger in a 1963 Opel Rekord when it was involved in an automobile collision on December 7, 1970, in Germany. He suffered permanent injuries and sued Newgent, the driver of the car, for negligence, subsequently settling with him. He also sued General Motors and Adam Opel AG (Opel) in Texas on the basis of negligence, strict liability in tort for the defective and dangerous design and manufacture of the windshield glass in the 1963 Opel Rekord, and breach of express and implied warranties. Plaintiff has based jurisdiction on diversity of citizenship, seeking service under the Texas long-arm statute.

The automobile in question was designed, manufactured and sold by Opel, a wholly owned subsidiary of General Motors located in Germany. Opel is a German corporation with its principal place of business in Russelsheim and is primarily engaged in the manufacture of automobiles. Opel has never maintained an office or place of business within the State of Texas, or, indeed, within

the United States. Opel has no agents, servants, or employees of the company assigned sales responsibility operating within the State of Texas or the United States. Opel has never entered into any contract which requires performance by it in whole or in part within the State of Texas, nor has it any assets located there. In the past years no automobile sales were made to importers (i.e., auto dealers) in the State of Texas. All sales made to the United States importer or distributor are FOB at a point outside the United States. Title to the automobiles, which become property of the importer, passes to the importer prior to their entry into the United States. The sole importer to which Opel sells automobiles for resale in the United States is Buick Motor Division of General Motors Corporation. Indeed, the relationship between GM and Adam Opel AG has been characterized as one of customer and seller.

Opel, which has its own engineering and design staff and its own sources of supply, manufactures automobiles primarily for the German and other European markets. The automobile involved in the accident at issue in this case, a 1963 Opel Rekord, was not one of those sold to Buick for export to the United States. It was purchased secondhand by Newgent in Germany, and the model in question was not at that time being exported to the United States.

This action was filed on April 12, 1973. Process was served through a single citation in April 1973 on General Motors Corporation and its subsidiary, Opel, through General Motors' agent for service of process, C. T. Corporation Systems in Dallas, Texas. On August 12, 1974, the district court ordered that separate citations be issued

and served on Opel. In response to that order, plaintiff served (1) C. T. Corpration, (2) Mr. T. M. Wetzel, Secretary-Treasurer of Al Parker Buick Company, a local automobile dealer, (3) Mrs. A. R. Varela, Secretary to the zone service manager of the Buick Motor Division of GM, and (4) the Secretary to State of Texas, pursuant to TEX. REV. CIV. STAT. ANN. art. 2031b. Opel moved the court to vacate and set aside service of process and to dismiss for lack of personal jurisdiction, submitting affidavits from the first three persons listed above reflecting that they were not authorized to receive service for Opel. The district court granted Opel's motion. *Walker v. Newgent,* 442 F.Supp. 38 (S.D. Tex. 1977).

Subsequently, General Motors moved for summary judgment on grounds that (1) it did not design, manufacture or sell the automobile in question, and (2) there was no ground for disregarding the separate corporate existence of Opel, as the district court had already held when it granted Opel's motion to dismiss. On February 6, 1978, the district court granted GM's motion.

Plaintiff has appealed this judgment, asserting that the district court does have personal jurisdiction of Opel. Plaintiff contends that he has made out a prima facie case that the defendant Opel is doing business in the State of Texas through the activities of and based on the relationship with its parent corporation, the defendant GM, and that this cause of action arises out of and is connected with the marketing and selling of Opel automobiles, both in this country and abroad. Plaintiff further maintains that the degree of ownership and control of GM over Opel clearly rises to the level necessary to impute business in Texas by GM Corporation to its wholly owned subsidiary, Opel.

Furthermore, plaintiff argues, since the court has in personam jurisdiction over Opel and since the business of Opel is clearly imputed to GM, the granting of the motion for summary judgment filed by the defendant GM should be reversed.

[1, 2] Plaintiff has predicated the existence of in personam jurisdiction over Opel on the Texas long-arm statute, Tex. Rev. Civ. Stat. Ann. art. 2031b. In deciding whether the state jurisdictional statute confers jurisdiction over a nonresident defendant in a diversity suit, it must be determined that (1) the defendant is in fact amenable to service under the statute (state law of the forum controls this question), and (2) if the state statute has been complied with, then federal law must be applied to determine whether assertion of jurisdiction over the defendant comports with due process. *Jetco Electronic Industries, Inc. v. Gardiner,* 473 F.2d 1228 (5th Cir. 1973); *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483 (5th Cir. 1974); *Wilkerson v. Fortuna Corp.,* 554 F.2d 745 (5th Cir. 1977). Plaintiff, the party seeking to invoke the court's jurisdiction, has the burden of establishing that jurisdiction by making a prima facie showing of facts on which it may be predicated. *Product Promotions, Inc. v. Cousteau,* 495 F.2d at 490-91.

The Texas long-arm statute provides that one who "does business" in the state is amenable to process in suits arising from such business. Since Opel, a German corporation, has neither assets, office, agents, nor employees in Texas, the traditional manifestations of "doing business" are not present. Also significant is the fact that even though Opel sold cars to Buick Motor Division of GM, the car in question was a model which was not

manufactured for export and in fact was sold second-hand in Germany; further, regarding those cars which were sold for export, title passed in Germany, and no contracts for sale were entered into or to be performed in the State of Texas.

[3] "Doing business" also includes entering into a contract to be performed in whole or in part within the state and the commission of a tort in whole or in part within the state. *See Jetco Electronic Industries, Inc. v. Gardiner, supra; Product Promotions, Inc. v. Cousteau, supra; Wilkerson v. Fortuna Corp., supra. Jetco* provides a gloss for the tort aspect of "doing business":

> It is immaterial that the tortious act occurred outside the state, for it is well established that the statute extends to injury occurring within the state as a result of a wrongful act committed outside the state. [citations omitted]

473 F.2d at 1232 n. 5. In the instant case, Opel did not commit a tort in whole or in part within the State of Texas. First, the automobile in question was designed and manufactured in Germany. Furthermore, the accident which is the basis of this suit also occurred in Germany. Thus, the activity here does not satisfy the tort provision of the Texas long-arm statute.

[4] As for the contract portion of the Texas long-arm statute, for jurisdiction to lie appellant must make a prima facie showing that "(1) a contract to be performed in whole or in part within Texas existed between itself and appellees and (2) the present suit arose out of that contractual arrangement." *Product Promotions, Inc. v. Cousteau,* 495 F.2d at 491. Since the record contains no evidence of any contract between plaintiff and either defendant, this provision of the statute is likewise inapplicable.

Nor can it be said that Opel, because of its admitted sales of Opel automobiles to GM for resale in the United States, is doing business in Texas. Article 2031b does expressly state that there are "other acts that may constitute doing business," and it is true that this circuit has upheld the exercise of jurisdiction on the basis of a manufacturer's placing a defective product in the "stream of commerce"; but these cases have involved an injury that occurred in the forum state, and the court was construing the tort clause of the statute. *See Coulter v. Sears, Roebuck & Co.,* 426 F.2d 1315 (5th Cir. 1970); *Eyerly Aircraft Co. v. Killian,* 414 F.2d 591 (5th Cir. 1969). A further factual distinction is that the Opel Rekord at issue was introduced into international commerce and was never put into service in the United States. *See Reich v. Signal Oil & Gas Co.,* 409 F.Supp. 846 (S.D. Tex. 1974), *aff'd,* 530 F.2d 974 (5th Cir. 1976).

[5] Notwithstanding all of the above, personal jurisdiction can still be found to exist over Opel if the relationship between the parent corporation, GM, which does business in the State of Texas, and the subsidiary German corporation, Opel, is one which would allow the court to find that the doing of business of the parent corporation can be imputed to the subsidiary. *Reul v. Sahara Hotel,* 372 F.Supp. 995 (S.D. Tex. 1974). Plaintiff contends that such a relationship exists. Since the alleged agency is one of the facts upon which appellant predicates his argument for jurisdiction, he has the "burden of making a prima facie showing of [its] existence." *Product*

Promotions, Inc. v. Cousteau, 495 F.2d at 492. Plaintiff has not met his burden.

Our cases dealing with the agency relationship with regard to in personam jurisdiction and the requirement of doing business address the situation where jurisdiction is sought over the parent corporation through its subsidiary's local activities. *See Product Promotions, Inc. v. Cousteau,* 495 F.2d at 492 and cases cited therein. The issue in the instant case is the reverse of that situation, but the same legal principles apply.

Plaintiff asserts that "[t]he degree of ownership and control of General Motors Corporation over Adam Opel AG clearly rises to the level necessary to impute business in Texas by General Motors Corporation to its wholly-owned subsidiary, Adam Opel AG." However, the evidence does not support this claim. As the record shows and the district court determined, the two corporations "do not have the same corporate offices or the same registered agent, nor are there any mutual officers or directors. There are no facts to support a prima facie case of actual control." Furthermore, the record establishes that Opel maintains its own engineering and design staff and its own sources of supply and that at most only eleven percent of its total production output was ever sold to Buick in any one year. As noted earlier, deposition testimony characterizes the relationship between GM and Opel as one of customer-manufacturer.

[6] Although GM does own 100% of Opel's stock, this fact alone is not sufficient to fuse the subsidiary into the parent corporation for the purpose of establishing an agency relationship. *See Cannon Manufacturing Co. v.*

Cudahy Packing Co., 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634 (1925); *Turner v. Jack Tar Grand Bahama,* 353 F.2d 954 (5th Cir. 1965); *Reul v. Sahara Hotel, supra.* Indeed, in *Gentry v. Credit Plan Corp.,* 528 S.W. 2d 571, 573 (Tex. 1975), the Texas Supreme Court stated that:

> A subsidiary corporation will not be regarded as the alter ego of its parent because of stock ownership, a duplication of some or all of the directors or officers, or an exercise of control that stock ownership gives to stockholders.

Thus plaintiff has not presented evidence establishing such a degree of control by General Motors over Opel as to permit imputing the business done in Texas by GM to its subsidiary Opel.

Finally, it is true that the Texas long-arm statute "authorizes assertion of personal jurisdiction over nonresidents to the limits of due process." *Great Western United Corp. v. Kidwell,* 577 F.2d 1256 (5th Cir. 1978), *citing Jetco, supra; Product Promotions, supra;* and *U-Anchor Advertising, Inc. v. Burt,* 553 S.W.2d 760 (Tex. 1977). This court's most recent due process analysis is found in *Kidwell*:

> [T]he governing principle is the fairness of subjecting a defendant to suit in a distant forum. Only if the nonresident defendant has such "minimum contacts" with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and justice'," *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), or if the defendant has performed some act "by which [it] purposefully avails itself of the privi-

> lege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), may the forum, consistently with due process, extend its long arm to embrace it. *Jetco Electronic Industries*, 473 F.2d at 1234; *see also Product Promotions, Inc.*, 495 F.2d at 494. Of necessity, inquiries into whether the exercise of personal jurisdition is permissible in a particular case are sensitive to the facts of each case. 2 L. Moore, ¶ 4.25[5] at 1172.

577 F.2d at 1266. Reading the "minimum contacts" requirement very broadly, the *Kidwell* court declared that these contacts "need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects in the forum state will suffice." *Id.* at 1266-67. In *Kidwell* the court found that the defendant's actions in regard to the plaintiff corporation did have foreseeable effects in Texas, the forum state. In the instant case, however, Opel's activities in Germany from which this cause of action arises did not have foreseeable effects in Texas, especially since the automobile in question was not manufactured for export and was sold only domestically.

Furthermore, even though the *Kidwell* decision recognizes that the Texas long-arm statute extends to the limits of due process, it firmly maintains the proposition that "unilateral activity by the plaintiff cannot produce the minimum contacts necessary to satisfy due process" and unequivocally requires some activity by the defendant. *Id.* at 1268. In the instant case, all the activity con-

cerning this cause of action occurred in Germany. Indeed, it appears that only because the plaintiff now resides in Texas was this action brought in that forum.

[7] On all of the above considerations, then, we conclude that the trial court correctly determined that the relationship between the defendant Opel and the forum state is too attenuated to support in personam jurisdiction.

[8] Defendant GM's motion for summary judgment was likewise properly granted. The sole basis of plaintiff's argument for reversal of the summary judgment appears to be the relationship between GM and Opel. This relationship did not comprise sufficient ownership and control to establish an agency relationship or to permit disregarding their separate corporate entities. And since the record reveals that GM did not design or manufacture the automobile in question, and as we have concluded that no agency relationship exists between GM and Opel, it necessarily follows that GM cannot be held liable for any alleged failing of Opel in the design and manufacture of the automobile in question.

AFFIRMED.

APPENDIX B

RANDALL O. WALKER

v.

GALE S. NEWGENT and General Motors Corporation and Adam Opel AG.

Civ. A. No. 73-H-469.

UNITED STATES DISTRICT COURT,
S. D. Texas,
Houston Division.

December 6, 1977.

A passenger injured in an automobile collision in Germany brought an action, inter alia, against the manufacturer of the automobile, alleging that the vehicle was defectively manufactured and unsafe and that such defects were the proximate cause of his injuries. The District Court, Singleton, J., held, inter alia, that the manufacturer, which was a wholly-owned Germany subsidiary of an American automobile manufacturer doing business in the district, was not amenable to service of process under the Texas long-arm statute.

Action against manufacturer dismissed for want of jurisdiction.

Richard W. Mithoff, Jr., Jamail & Gano, Houston, Tex., for plaintiff.

B. Jeff Crane, Jr., John T. Golden, Vinson & Elkins, Houston, Tex., for defendants.

Memorandum and Order:

SINGLETON, District Judge.

Plaintiff Randall O. Walker has brought this suit for damages arising out of injuries he suffered in an automobile accident in 1970. Mr. Walker was a passenger in a 1963 Opel Rekord automobile owned and operated by Gale S. Newgent, when the car was involved in a head-on collision in Giessen, Germany. Mr. Walker has alleged that the car was defectively manufactured and unsafe and that such defects were the proximate cause of his injuries. The car was manufactured in Germany by Adam Opel AG, a German corporation and wholly-owned subsidiary of General Motors Corporation. Mr. Newgent purchased the car secondhand in Germany. Adam Opel AG has challenged the in personam jurisdiction of this court and moved for dismissal of the suit against it.

Process was served through a single citation in April, 1973, on General Motors Corporation and its subsidiary, Adam Opel AG, through General Motor's agent for service of process, C. T. Corporation Systems in Dallas, Texas. Attorneys for General Motors filed an answer purportedly on behalf of General Motors and Adam Opel AG. Following discovery, these same attorneys filed a motion to withdraw the answer filed for Opel on the basis that Opel was a separate corporate entity organized under German law having no agent for service in Texas and that the answer filed on its behalf was without its authorization or knowledge. On August 12, 1974, this court ordered that separate citation be issued and served on Adam Opel AG. Consideration of Opel's motions to

withdraw its answer and its motion to dismiss the action for lack of in personam jurisdiction was deferred to allow for further discovery of the facts relating to personal jurisdiction. That discovery has now been completed.

[1] The threshold issue to be considered by this court is whether Adam Opel AG has waived its jurisdictional defense through the answer filed on its behalf in June, 1973, by the attorneys for General Motors. The affidavit of R. Pinnekamp, an attorney in the legal department of Adam Opel AG, states that Adam Opel AG had no knowledge of this lawsuit until more than a year after the answer was filed. Mr. Pinnekamp further stated that any appearance in this lawsuit was without Adam Opel's knowledge or authorization. The affidavit of Jeff Crane, the attorney who filed the answer on behalf of General Motors Corporation and its subsidiary, Adam Opel AG, stated he did so on the instructions of General Motors' insurer and without authorization from Adam Opel AG and prior to discovering that Adam Opel AG was a separate corporation. In recognition of Opel's answer being unauthorized by it, this court ordered separate citation be issued as noted above. Subsequent discovery has revealed evidence which supports a finding that Adam Opel AG is indeed a separate corporate entity as discussed infra. This court finds that Adam Opel AG's June, 1973, answer did not operate as a waiver to its jurisdictional defense since that answer was without knowledge or consent of Opel.

[2] The burden is on the plaintiff, Mr. Walker, to establish the existence of in personam jurisdiction over Adam Opel AG. *Product Promotions, Inc. v. Cousteau,*

495 F.2d 483 (5th Cir. 1974). In response to this court's August 12, 1977, order, Mr. Walker served (1) C. T. Corporation, General Motors' agent for service of process, (2) Mr. T. M. Wetzel, secretary-treasurer of a local Buick dealer, and (3) Mrs. A. R. Varela, secretary to the zone service manager of the Buick Motor Division of General Motors, in addition to (4) the Secretary of State of Texas, pursuant to Tex. Rev. Civ. Stat. Ann. art. 2031b. In each case Opel moved to vacate and set aside service of process. In support of such motions, affidavits were filed from the first three entities listed above, stating that the persons served were not authorized to receive service for Opel. Thus the question must be resolved in light of the Texas long arm statute and the ample case law as applied to the facts presented through discovery by both parties.

Personal jurisdiction over a foreign corporation must comport with the requirements of due process in that

> (1) the nonresident defendant must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice. . . .

International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

The evidence presented by both parties in depositions and affidavits established that Adam Opel AG is a German corporation which manufactures automobiles for domestic sale and for export. It is a wholly-owned subsidiary of General Motors Corporation which undis-

putedly does business in this state. Adam Opel AG, however, has no assets, offices, agents, or employees in Texas. All Opel automobiles sold to the Buick Motor Division of General Motors during the time in question were sold by Opel to Buick f.o.b. Germany. Buick then advertised, sold, and serviced these cars throughout the United States, including Texas.

Significantly, the particular automobile involved in this case was a 1964 Opel Rekord, a model which was never manufactured for export and was sold only domestically. This particular model was never sold to or purchased by Buick. It was placed in commerce directly by Opel into its domestic market.

Notwithstanding all of the above, personal jurisdiction can still be found to exist over Adam Opel AG if the relationship between the parent corporation, General Motors, which does business in the state of Texas, and the subsidiary German corporation, Adam Opel AG, is one which would allow the court to find that the doing of business of the parent corporation can be imputed to the subsidiary so that Texas can acquire in personam jurisdiction over the German corporation. *Reul v. Sahara Hotel,* 372 F.Supp. 995 (S.D. Tex. 1974). Plaintiffs in *Reul* alleged that one defendant, a California subsidiary of the defendant parent company, did business in Texas through its parent corporation which was licensed to do business in Texas. Service of process over this subsidiary was achieved under the Texas long arm statute as in the instant case. The California corporation neither sold nor solicited any sales in Texas; it did not receive income from sales in Texas; it did not have a license to do business or own any property in Texas. The question in

Reul of whether or not in personam jurisdiction was proper against this subsidiary turned on the nature of its relationship with the parent corporation, which assuredly did business in Texas. The question in the instant case is the same. However, the widely differing fact pattern calls for a different conclusion.

The facts presented to the court in *Reul* led to the conclusion "that there is present here more than that amount of control of one corporation over another which mere common ownership and directorship would indicate." *Reul,* at 998. The evidence presented in that case showed the close interrelationship of the various corporations with the parent company. Salesmen's assignments and commission payments emanated from the owners of the parent corporation; the parent and subsidiary shared common officers; the senior vice president and director of the parent company was also the manager of the Western Division, which included the California subsidiary. The court found that while on paper the corporations looked like separate entities, "they are for all *operational* purposes one big, albeit well organized, corporation . . . ." *Reul,* at 1000 (emphasis in original). All the business was conducted out of New York, the home office of the parent corporation; all of the corporations owned by the parent were covered under one insurance policy; employees were hired by the parent corporation for its benefit and for the benefit of the other corporations. In addition, they advertised under one slogan and trademark.

The instant case is distinguishable from *Reul, supra.* The evidence in this case reveals that Adam Opel AG is not controlled by General Motors. They do not have the

same corporate offices or the same registered agent, nor are there any mutual officers or directors. There are no facts to support a prima facie case of actual control. The only significant factor relating to this issue is that General Motors owns 100 percent of Adam Opel AG's stock. According to the deposition of Mr. William F. Shea, Director, Marketing Staff Operations of General Motors Overseas Division, General Motors Buick Division and Adam Opel had a pure manufacturer-customer relationship. The record reveals that Opel had its own engineering and design staff and its own sources of supply for component parts. From 1964 to 1975, Buick purchased no more than 11 per cent of Opel's total automobile production in any one year.

Mr. William M. Veselick, a zone manager for Buick Motor Division, testified in his deposition that suggestions made for design changes and communicated through channels to Adam Opel were not followed by Opel. Furthermore, Mr. Lloyd D. Loggins, another Buick zone manager, testified on deposition that Adam Opel did not seek the advice of General Motors' Buick Division about changes in the Opel cars.

The Texas Supreme Court has recently stated that "where management and operations are assimilated to the extent that the subsidiary is simply a name or conduit through which the parent conducts its business, the corporate fiction may be disregarded to prevent fraud or injustice." *Gentry v. Credit Plan Corp.*, 528 S.W.2d 571 (Tex. 1975). That court further stated that

> [a] subsidiary corporation will not be regarded as the alter ego of its parent because of stock ownership, a duplication of some or all of the directors or officers, or an exercise of control that stock ownership gives to stockholders.

Gentry, at 573.

In summary, this court finds that Adam Opel AG has not waived its jurisdictional defense by an answer filed on its behalf without its knowledge or consent; that Adam Opel AG was not doing business in the state of Texas during the time in question; that the act complained of did not arise out of any business done by Adam Opel AG in the state of Texas; that the degree of ownership and control by General Motors over Adam Opel AG does not rise to the level necessary to impute the business done in Texas by General Motors to its subsidiary Adam Opel AG; and that in personam jurisdiction does not lie as to Adam Opel AG in this lawsuit.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that defendant Adam Opel AG's motion to vacate, set aside service of process, and dismiss for want of jurisdiction be, and hereby is, GRANTED.